FILED
JAN 3 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(6)

No. 05-1323

IN THE

Supreme Court of the United States

UGI UTILITIES, INC.,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON*
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

*Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The CERCLA § 107(a)[1] issues presented in this and two other pending cases are currently being litigated across the Nation, principally in cases involving private party defendants like petitioner. Complete and expeditious resolution of the issues can best be accomplished by granting the petitions for a writ of certiorari in this case and in *E.I. du Pont de Nemours & Co.* v. *United States*, No. 06-726 (filed Nov. 21, 2006) (*DuPont*), as the government suggests, and consolidating those cases for oral argument.

The United States concedes (Br. for U.S. as Amicus Curiae at 8 (U.S. Br.)) that "there is a clear conflict among the courts of appeals on the issue" presented in this case and that the Court should resolve the conflict this Term "to end the ongoing uncertainty in the lower courts" (Br. for the Resp'ts at 14, *Du Pont* (No. 06-726)). The United States contends, however, that this case, which created the circuit conflict and ongoing uncertainty, is a less suitable vehicle than the two cases in which it is the PRP-defendant, *DuPont* and *United States* v. *Atlantic Research Corp.*, No. 06-562 (filed Oct. 24, 2006) (*Atlantic Research*). U.S. Br. at 10.

But the petition in *DuPont* presents a narrower issue than the one presented here. *Atlantic Research*, which the government has stated need not be reviewed to resolve the circuit conflict (Br. for the Resp'ts at 13, *DuPont* (No. 06-726)), is not yet ripe for consideration and in the ordinary course would delay argument until next Term. The *Atlantic Research* petition, moreover, seeks review of an Eighth Circuit decision that followed the reasoning of the Second Circuit in this case.

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[1] Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a).

Granting the petitions in this case and in *DuPont* will ensure complete vetting of the issues by affording the government a full opportunity to advance its position that § 107(a) does not provide PRP remedies against the United States, as well as affording petitioner the opportunity to challenge the Second Circuit's decision that § 107(a) provides a cost recovery remedy to PRPs, like respondent, that lack a CERCLA contribution remedy.

1. This case and *DuPont* are complementary; in combination they present for review the full range of proposed § 107(a) remedies. The court of appeals held that § 107(a)'s cost recovery remedy affords a PRP the right to recover "100 percent of its costs from other [PRPs]." Pet. App. 15a n.9. *DuPont* addresses—and rejects—the narrower claim that pursuant to § 107(a) "the Government [as PRP] must contribute to [DuPont] a share of the cleanup costs." Supp. Br. App. 2a (*E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515, 518 (3d Cir. 2006)). DuPont's petition is similarly limited only to the question of whether § 107(a) or federal common law allows PRPs to recover from other PRPs "an equitable share of its cleanup costs." Petition for Writ of Certiorari at i, *DuPont* (No. 06-726).

The petition in this case should be granted along with the *DuPont* petition to ensure that the broader cost recovery right the Second Circuit found in § 107(a) is fully presented and resolved. Resolution of only the more limited contribution right that DuPont asks the Court to find in § 107(a) or federal common law would potentially leave open whether § 107(a) affords PRPs a cause of action to recover all of their cleanup costs and would therefore not resolve completely the conflict among the lower courts.

This case further complements *DuPont* because in this case a private party, rather than the government, is the PRP defendant. Courts and PRPs have suggested that the government's "dual role" both as CERCLA's primary enforcer and as a sometimes liable party supports holding that CERCLA af-

fords PRPs a remedy against the government when it is a PRP. Supp. Br. App. 77a (*Atlantic Research* v. *United States*, 459 F.3d 827, 837 (8th Cir. 2006)); Petition for Writ of Certiorari at 24-25, 27-28, *DuPont* (No. 06-726). Seeking to strip the government of its perceived ability to control PRP actions against it, the Eighth Circuit created a PRP remedy that does not depend, as does CERCLA's § 113(f)[2] contribution remedy, on either a government enforcement action or a settlement with the government. Supp. Br. App. 76a-77a (*Atlantic Research*, 459 F.3d at 836-37).

DuPont's petition also champions this approach, arguing that creation of a statutory or federal common law right to recover from the United States its equitable share of cleanup costs is necessary to ensure that the United States, which unlike private PRPs cannot be sued under state law, will not be able to avoid cleanup liability by refusing to sue or settle with a PRP. Petition for Writ of Certiorari at 24-25, 27-28, *DuPont* (No. 06-726). Given this rationale, if, contrary to the positions of petitioner and the United States, such a remedy exists, it should not encompass suits against private defendants, like UGI, that have no "dual role." Because *DuPont*, like *Atlantic Research*, only involves claims against the government, the Court's consideration of whether federal law affords PRPs cost recovery or contribution claims would benefit from reviewing this case involving a private party defendant, in addition to *DuPont*.

2. The Second Circuit's rejection of respondent's § 113(f)(3)(B) contribution claim is no impediment to this Court's review of the § 107(a) issue. The government suggests that this case presents a "less suitable vehicle" than either *DuPont* or *Atlantic Research* because respondent might argue, although it has not thus far, that the Second Circuit erred in holding that it lacks a contribution remedy under § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B). Such an argu-

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[2] 42 U.S.C. § 9613(f).

ment, the government contends, would "effectively constitute[] an alternative ground for affirmance of the court of appeals' decision" (U.S. Br. at 11), and might be a "predicate to an intelligent resolution" (*id.* (quotation marks omitted)) of the § 107(a) issue.

The government's suggestion, however, is premised on a misunderstanding of the Second Circuit's holding. Because the court of appeals' § 107(a) remedy is broader than the relief available under § 113(f)(3)(B), the court of appeals' judgment cannot be affirmed on § 113(f)(3)(B) grounds. Section 107(a) provides a claim for all incurred response costs, a vehicle for shifting the entire cleanup burden to another PRP. In contrast, § 113(f)(3)(B) affords only a contribution remedy and requires courts to allocate response costs among liable parties using "equitable factors." *See* 42 U.S.C. § 9613(f)(1). Even if petitioner is entitled to contribution counterclaims, the Second Circuit's § 107(a) claim potentially allows respondent to recover substantially more than its equitable share because it may succeed in shifting the burden of proof on allocation issues as well as shifting the liability for orphan shares. *See* Pet. 16.

It is for these reasons (as well as the different limitations periods for § 107(a) and § 113(f) claims) that other courts of appeals, including the Third Circuit, have concluded that allowing PRPs to use § 107(a) "would render section 113 a nullity," *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997), because PRPs "would quickly abandon section 113 in favor of the substantially more generous provisions of section 107," *id.*—just as respondent apparently has done here. Therefore, § 113(f)(3)(B) cannot provide an alternative ground for affirmance of the court of appeals' judgment, and, given the more robust relief potentially available under § 107(a), the first step in the analysis is whether PRPs are entitled to that

section's remedy.[3] *See Schaefer* v. *Town of Victor*, 457 F.3d 188, 202 n.19 (2d Cir. 2006) (refusing to decide whether PRP could bring a § 113(f)(3)(B) claim because PRP could bring a claim under § 107(a)).

3. The Second Circuit's holding that § 107(a) expressly provides PRPs the right of cost recovery, rather than an implied contribution right, does not make this a less suitable vehicle to consider the § 107(a) issues. The United States also suggests that this case may present a less suitable vehicle than *DuPont* or *Atlantic Research* because the Second Circuit held that § 107(a) expressly provides PRPs a cost recovery claim and did not address the "subsidiary question" (U.S. Br. at 13) of whether § 107(a) contains an implied contribution right.

To the extent that any implied right of contribution is simply an alternative rationale to provide PRPs a cost recovery remedy based on CERCLA's text, structure or history, it is subsumed in the court of appeals' judgment from which petitioner seeks review. *See* Pet. at 12-17. Even if the implied

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[3] As the petitions in the pending cases make clear, deciding whether § 107(a) affords PRPs a right to recover costs from other PRPs will inevitably involve consideration of the PRP contribution remedy Congress provided in § 113(f). The court of appeals' attempt to limit its newly-coined cost recovery claim to "voluntary" PRPs—i.e., PRPs lacking a § 113(f) contribution remedy—underscores that inevitability. *See* Pet. 11a-21a; *see also* Supp. Br. App. 76a (*Atlantic Research*, 459 F.3d at 836-37) ("liable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113").

Also, even if respondent attempts to pursue the narrower § 113(f)(3)(B) remedy, the Court could dispatch it without additional burden. An administrative settlement gives rise to a § 113(f)(3)(B) contribution claim only when, as the section expressly provides, the party has "resolved its liability to . . . a State . . . in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). The Voluntary Cleanup Agreement on which respondent relied makes no mention of resolving CERCLA claims and instead expressly reserves to the state enforcement agency the right to bring such claims in the future. Pet. App. 9a-10a.

remedy the government describes is a separate cause of action (and therefore has been forfeited by respondent), the deficiency (if it is one) is easily remedied by considering this case in tandem with *DuPont*, since that case lacks the cost recovery issue presented here and the government does not dispute that the implied contribution claim has there been preserved.

* * * *

All issues implicated by the question of whether PRPs that lack a § 113(f) contribution claim can recover cleanup costs under federal law from private and governmental PRPs are squarely presented by this case and *DuPont*. In order to resolve the obvious circuit conflict, avoid further costly litigation in the lower courts, and consider those issues in a more complete context, the petitions for review in this case and in *DuPont* should be granted and the cases consolidated for oral argument.

Respectfully submitted,

G. MICHAEL HALFENGER
PAUL BARGREN
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JAY N. VARON
Counsel of Record
FOLEY & LARDNER LLP
3000 K Street, N.W.,
Suite 500
Washington, D.C. 20007
(202) 672-5300

Attorneys for Petitioner

January 2007